Prosecuting Child Sexual Assault Cases: To specialise or not, that is the question

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Introduction

This is the second paper in a series that discusses the case for specialisation in relation to the prosecution of child sex offences. The first paper (Cossins 2006a) examined the entrenched difficulties associated with prosecuting a crime in which the Crown's case typically amounts to the word of a child against the denial of an adult with no eyewitnesses, a lack of forensic and other corroborative evidence and a complainant who, because of age and the psychological effects of child sexual abuse, is peculiarly vulnerable as a witness. All of these factors mean that the focus of the trial is on the credibility of a vulnerable, young witness in a context in which juries have no particular experience or knowledge of the incidence of child sexual assault nor the behaviour of child sex offenders. In addition, jurors are likely to be affected, to some extent, by the prevalent myths that children fantasise or lie about child sexual abuse, by the fact that child sexual abuse is a cultural taboo, and the widespread belief that child sexual abuse is committed by deviant men, who are strangers to the child.

According to attrition rate studies (Crime and Misconduct Commission, Queensland 2003; Wundersitz 2003; Fitzgerald 2006), in Australia the vast majority of offenders remain undetected. Of those who are reported, the vast majority never face trial (sometimes because the complainant does not wish to proceed), and of those that go to trial, the vast majority are acquitted (Cashmore 1995; Cossins 2001; Cashmore & Trimboli 2005).

This means that change is required at all stages of the criminal justice system in order to increase reporting, to reduce the attrition rate of reported cases and thereby increase the number of cases going to trial, to reduce delays between charging and outcome and to increase conviction rates. For the past year or so, there have been a number of organisations looking at the issue of reform in relation to the prosecution of sex offences around Australia, including the Victorian Law Reform Commission (2004), the Tasmania Law Reform Institute (2006), the Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission (2005) and the NSW Criminal Justice and Sexual Offences Taskforce (2006).[1] Yet few have considered reform measures that would address the unique features of CSA as a crime, nor the public interest in reducing the incidence of child sexual abuse in the Australian community.

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1 This taskforce was established by the NSW Attorney-General in January 2005 and administered by the Attorney-General's Department. It produced a report containing 70 recommendations

To date, reform measures have largely focused on the problems associated with the re-traumatisation of the child victim during the trial, giving rise to a range of vulnerable witness protections, such as the use of CCTV, that are now in use around Australia.[2] However, few reform measures have addressed attrition rates and the conduct of the trial process. The first paper highlighted the fact that whilst vulnerable witness protections decrease the stress and anxiety experienced by complainants when giving evidence (Eastwood & Patton 2002; Hamlyn, Phelps, Turtle & Sattar 2004; Cashmore & Trimboli 2005), these protections have no impact on the trial process and trial outcomes. Their existence may, however, make more victims of sexual assault willing to give evidence such that more cases proceed to trial (Hamlyn et al 2004).

Because of the limitations of vulnerable witness protections, it is timely to consider more radical reform measures in the form of specialist courts for the prosecution of child sex offences. This paper presents two case studies of overseas specialist courts — the South African Sexual Offences Courts and the Manitoba Family Violence Courts in Canada — before discussing the applicability of a specialist child sex offences court, based on the adversarial model for Australia, and a 'less adversarial' approach based on a Family Court of Australia pilot program.

Specialist approaches to sex offences

Whilst there is, in various Australian jurisdictions, 'a more specialized approach in handling sexual offences cases which include features such as specialized prosecution teams, judicially managed lists, special Legal Aid grants, witness support staff and specialized court staff' (Victorian Law Reform Commission 2004:171), there is a distinction between these specialist approaches and the establishment of a specialist court. At the same time, a specialist court will involve many of these specialist approaches.

Albecker (2003:31) describes specialist courts as those in which:

> the work conducted ... is limited to a pre-determined range of issues. ... In other words, these courts have been created by the legislature with the express purpose of providing a forum for the enforcement of rights and responsibilities created in specific legislation. Thus, in some senses their very existence is predicated on the laws that they are intended to enforce.

However, the term, 'specialist courts', also refers to courts that are created within an already existing court structure or jurisdiction. These courts, which Altbecker (2003:32) refers to as 'dedicated courts', are 'seen more as a specific strategy to assist with the more speedy or effective resolution of certain matters. Such matters, while handled by all courts (at the appropriate level), are handled exclusively by some courts in some jurisdictions where conditions warrant it' (Altbecker 2003:32–33). In particular, the establishment, practices and procedures of specialist courts are designed to achieve a set of identified public policy objectives. The key aspects of these courts are the special listing arrangements that select cases to be heard in the specialist court, case management practices for early disposition of cases and specialisation at the prosecutorial and judicial levels.

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2 See s6, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s21A, *Evidence Act* (NT); ss21A and 21AP-AR, *Evidence Act 1977* (Qld); *Evidence (Children) Act 1997* (NSW); s13, *Evidence Act 1929* (SA); *Evidence (Children and Special Witnesses) Act 2001* (Tas), ss106N and 106R, *Evidence Act 1906* (WA); s 37C, *Evidence Act 1958* (Vic).

In South Africa, for example, the Wynberg Sexual Offences Court is a dedicated criminal court which deals exclusively with sex offences in order to 'provide a more appropriate service to the victims of those crimes' (Altbecker 2003:33), in a country where the rate of reported sexual assault is considerably higher compared to Australia (Kruger 2005:1).[3]

Whether a court is dedicated or created under specific legislation, both types 'offer an environment in which the skills of the personnel, the management systems in place, and the infrastructure available are better suited to these matters than would be the case in more generalised court environments' (Altbecker 2003:33). However, as discussed below in relation to the case studies, the most important characteristic of these courts is the degree of expertise at the prosecutorial and judicial levels and the fact that 'such specialsed knowledge [leads to] the most effective processing of cases'. This means that 'both the prosecution and judiciary will become evermore familiar with complex factual issues as well as with established law and procedure', giving rise to consistency in the conduct of cases and judicial decision-making (Altbecker 2003:34).

The aims of specialisation in relation to child sex offences

An analysis of the outcomes and problems associated with specialist courts in other jurisdictions shows that it is important to think about the aims that can be achieved in relation to the prosecution of sex offences (Sadan, Dikweni & Cassiem 2001). As discussed above, because of the degree of under-reporting and the attrition rate of child sex offences, the reality is that is that only a minority of child sex offenders will ever be reported, charged or prosecuted, let alone convicted during their offending careers. This means that the social, psychological and economic burden of CSA is left to the victims and their families, and sometimes, the community, when victims engage in anti-social behaviour or develop psychiatric illnesses.

If prevention is one of the main aims, reform options must deal with the prosecution process and outcomes rather than just implement measures that protect the child from the rigours of the adversarial system. More specifically, reform to the child sexual assault trial is required for the following public interest reasons:

- the relatively high incidence of child sexual abuse in the Australian community,[4]
- the much higher incidence of child sexual abuse in Aboriginal communities compared to the non-Aboriginal population (Australian Institute of Health and Welfare 2006);
- the fact that the majority of offenders are either related or known to their victims and the reality of continued access;

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3 According to the South African national crime statistics for 2004, 52,733 rape cases were reported between 1 April 2003 to 31 March 2004 (Kruger 2005: 1; citing Jankielsohn 2004). In Recorded Crime Statistic for 2003, 18,237 reports of sexual assault were made to police in Australia (Australian Bureau of Statistics, 2004) giving rise to a prevalence rate of 0.09%. Even though the population of South Africa is more than double that of Australia according to the World Factbook, CIA (44,344,136 versus 20,090,437 as at July 2005), the prevalence rate of sexual assault in South Africa is still much higher.

4 Fleming (1997) found that 33% of 710 women had experienced non-contact or contact abuse before the age of 16; 20% had experienced contact abuse before the age of 16. In 2000, Dunne, Purdie, Cook, Boyle and Najman (2003) reported that, of 1784 Australian women and men aged 18–59, 33.6% of women and 15.9% of men had experienced 'non-penetrative' sexual abuse before the age of 16; 12% of women and 4% of men had experienced unwanted penetration or attempted penetration before the age of 16.

- the difficulties associated with detection and the high rate of underreporting;
- the high attrition rate of reported cases;
- the relatively low conviction rate for the small proportion of cases that go to trial;
- the long delays between charging and trial outcome and the need to increase disposition times;
- the need to develop a co-ordinated, integrated approach to the processing and management of child sexual assault cases by all agencies involved in the criminal justice process;
- reducing the risk of recidivism, through the imposition of custodial sentences that are linked to treatment programs;
- the need to minimise re-traumatisation suffered by victims as a result of delays and the trial process.

These objectives highlight the public interest issues involved in the prosecution of child sexual assault. Whether or not a specialist court would be successful in reducing the incidence of CSA in the community is still very much an unresolved question. If it were to do so, it would be necessary to recognise that the prosecutorial, sentencing and rehabilitative processes of the court would need to be linked, since there is sufficient evidence to show that conviction and sentencing, on their own, without the involvement of a specifically designed sex offender treatment program, have little effect on reducing the recidivism of offenders after release (Salter 1995; Bagley & Thurston 1996; Prentky, Lee, Knight & Cerce 1997).

Do specialist courts have an impact on prosecution outcomes?

A number of overseas jurisdictions have introduced specialised courts for the prosecution of domestic violence offences and/or sexual offences. These include the domestic violence courts of California (Weber 2000); the family violence courts of Manitoba (Ursel 1992) and Ontario, Canada, the sexual offences court of Florida (Dahlburg 2001) and the sexual offences courts in South Africa, one of which includes a child sexual offences court (Stanton, Lochrenberg & Mukasa 1997; Sadan et al 2001; Moult 2002). In Australia, the Joondalup Family Violence Court (JFVC) was opened at the Joondalup Court in Western Australia in December 1999 to deal with restraining orders, and all criminal matters related to family violence, but not including CSA (Kraszlan & West 2001:197).[5]

The common features of these courts include a screening process to identify cases that fall within the domestic violence or sex offences category, as well as dedicated resources, court space and specialised court personnel (Weber 2000:24); that is, 'a "team approach" involving the judge, prosecutor, defense counsel, treatment or intervention provider, and probation or correctional personnel' (Weber 2000:24, citing Rottman & Casey 1999).

The establishment of specialist domestic violence courts with these features in North America, for example, has been based on an acknowledgment of the serious public health issues arising from such violence, the relatively high incidence of it and the fact that domestic violence is rarely a one-off event which increases with frequency and severity over time (Weber 2000; Ursel 2002). In addition, there has been a recognition of the

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5 For a summary of other domestic violence courts in Australia see Stewart (2006).

benefits of specialised personnel dealing with such cases since they 'become intimately familiar with the complexities of domestic violence matters' which has flow-on effects for victims and the efficient processing of cases, including the consistency of orders (Weber 2000:27; Ursel 2002).

Indeed, the reasons behind the establishment of domestic violence courts mirror similar concerns about CSA in terms of the public health issues arising from such abuse.[6] Studies of child sex offenders, together with victim report studies, indicate that CSA is rarely a one-off event, with the frequency and seriousness of it increasing with time (Cossins 1999; 2000; Studer, Clelland, Aylwin, Reddon & Monro 2000).

Like drug courts, the establishment of specialist domestic violence and sexual offences courts are innovations that are designed to better address specific criminal, health and community problems. However, unlike drug courts and domestic violence courts, a specialist court dealing with child sex offences must contend with a victim who is a child (or at least was at the time of the alleged offence) and who, in the majority of cases, has delayed their complaint, thus compromising the availability of corroborating evidence.

Furthermore, the traditional prosecution of child sex offences has not involved consideration of the safety of the victim, nor a recognition of the documented behaviour of sex offenders, the safety of other children in the community and the accountability/ rehabilitation of the offender. Part of the challenge in devising an alternative method for the prosecution of child sex offences would ideally involve, an evidence-based assessment of the safety of the victim and, where appropriate, other children, as well as accountability and prospects of rehabilitation of the offender and how the concepts of safety and accountability could be integrated into a specialist court system, if at all.

It is also important to note that particular administrative changes are essential to the success of specialist courts, including the establishment of criteria for screening and assignment of cases to a specialist court, appropriate methods of evaluation and assessment of outcomes to determine the impact and effectiveness of the court, as well as adequacy of resources. Inadequate funding has resulted in a high staff turnover and inadequate training of personnel in the Wynberg Sex Offences Court in South Africa, thus hampering the extent to which the court has been capable of meeting its objectives (Sadan et al 2001).

The Sexual Offences Courts in South Africa

The Wynberg Sexual Offences Court (SOC) was the first of its kind to be established in South Africa in March 1993 at the Wynberg Magistrates Court.[7] Since 1999, there has been a government policy to establish a SOC in every regional court in South Africa and, by May 2005, 54 such courts had been established (Mabandla 2005). The Wynberg SOC deals with sexual offences committed against both women and children, whilst the Cape Town SOC only deals with sex offences against children. The expansion of SOCs throughout South Africa and the re-commitment to the Wynberg SOC were the result of particular policies developed after the election of the first democratic government in South Africa; in particular, the aim of ending the secondary victimisation of sexual assault complainants (both women and children) and the need to improve the well-being of children and access to justice for children.[8] As Sadan et al (2001) explain, this commitment 'is reflected in the

6 A plethora of studies indicate that victims can suffer a wide range of physical and emotional problems, both short and long-term (Bagley & Thurston 1996; Cossins 2000).

7 Although called Regional Magistrates Courts, the SOCs are analogous to District Courts in Australia in terms of court hierarchies.

South African government's ratification of the Convention on the Rights of the Child ... in 1995 and in the South African Constitution adopted in 1996, which enshrines the rights of the child in Section 28 of the Bill of Rights' (2001:8). In particular, South Africa's *Gender Policy Statement* (1999) adopts 'a victim-based policy stance' with the aim of reducing the secondary victimisation that victims of sexual assault experience in the criminal justice system (Moult 2002:13). At the same time, it was recognised that reported cases of sexual assault 'were unacceptably high' and that 'the actual number of rape cases [was] substantially higher than the number reported' (Kruger 2005:4).

According to Altbecker's (2003) classification, the Wynberg SOC and subsequent SOCs are not set up under specific legislation but constitute dedicated courts to address specific public policy objectives. When the Wynberg SOC was established it was designed to meet two other key objectives in addition to reducing secondary victimisation (Kruger 2005:5):

(i) to establish a co-ordinated and integrated approach between agencies dealing with sexual assault cases; and
(ii) to improve the investigation and prosecution of sexual assault matters and to increase reporting and conviction rates.

From an evaluation of the Wynberg SOC by Sadan et al (2001) and more recent work by Kruger (2005) it is possible to identify the following features of the court. A novel feature of the Wynberg SOC is the one-stop service centre for rape victims (called the Thuthuzela Care Centre (TCC)) which is linked to the court. The Victim Services Co-ordinator carries out a pre-trial consultation with complainants, pre- and post-counselling and referrals for long-term counselling. This co-ordinator also trains and co-ordinates intermediaries (discussed below). Victims are transported to the TCC as soon as possible after reporting to police and all other services (legal and medical) are co-ordinated and provided within the TCC.

In relation to court space, five courts have been designated SOCs and are housed on the fifth floor of the Wynberg Magistrates Court building with all SOC staff being located on the same floor. The Wynberg SOC serves four magisterial districts, covering 21 police stations. Although trials are adversarial, there is no jury, with magistrates sitting on a rotational basis by hearing cases in the SOC one week in every six. Each court is manned by two dedicated, specially trained prosecutors who prosecute cases alternatively and have at least five years experience. These prosecutors are paid more than those in other courts in order to encourage volunteers. Crucially, prosecutors are assigned to a case from the time the police docket is received and remain with the case until its finalisation, ensuring continuity of prosecutors. Training of prosecutors is provided by a specialist unit, called the Sexual Offences and Community Affairs Unit (SOCA). This unit also co-ordinates the establishment of the SOCs, the TCCs and conducts public awareness campaigns about sexual assault.

The Wynberg SOC has three camera rooms which are equipped with CCTV facilities. They are only available to be used for child complainants, who make up approximately 50% of the case load. Like the situation in some courts in NSW and WA, complainants wait in a private and victim-friendly waiting room rather than sitting in the corridors of the court building with the general public and the accused. However, the prosecutor must make an application to the court for the complainant to testify via CCTV, under s 170A of the *Criminal Procedure Act 1977*, which stipulates that the child complainant must not be

8 The key policy documents were the *National Crime Prevention Strategy* (1996); the *Justice Vision 2000* (1996) document and the *First 1000 Days Report* (1997).

exposed to undue mental stress. Since there is no automatic right to give evidence via CCTV, a social worker has to testify as to why he or she thinks it would be in the best interests of the child to do so. Unless there is an objection by the defence, permission is likely to be granted, particularly where the child is under 12 years. At this stage, the social worker then becomes the intermediary working on the case. The role of the intermediary is to sit in the camera room with a child complainant, translate questions into age appropriate language and to 'basically cushion the words and to take away the harshness and aggressive tone of ... the lawyers'' (Sadan et al 2001:19)

An evaluation by Sadan et al (2001) examined the Wynberg and Capte Town SOCs for the years 1995–2000 and used the Mitchell's Plain Court as a 'control to investigate what happens to child sexual abuse cases in the absence of a dedicated programme' (Sadan et al 2001:6). They found that the conviction rate was higher in the SOCs than in the comparison court. However, because the statistics for the Wynberg SOC were not disaggregated for women and children, conviction rates for cases involving children were not able to be compared to conviction rates for cases involving women. Nonetheless, for the Wynberg SOC, the annual average conviction rate for the period 1995–2000 was 68.5%. The highest conviction rate was 76% in 1996, the lowest was 65% in 1997. Sadan et al (2001:37) do not specify whether these conviction rates include guilty pleas *and* guilty verdicts, or whether these figures represent guilty verdicts only. The available data provided for the Cape Town SOC (which only deals with cases involving children) was relatively incomplete, although there had been an increase in convictions between 1996–1999 from 41% to 66% (but, again, the study did not specify whether these rates included guilty pleas). Sadan et al (2001:39) concluded that the conviction rates in the SOCs were higher than those in other Magistrates Courts that dealt with sexual offences, although no comparative figures were quoted.

From an administrative point of view, the main problems identified by Sadan et al (2001) were associated with under-funding and, as a consequence, high case-loads and high-staff turnover, particularly prosecutors. In 2000, financial constraints saw just two courts dealing with 800 cases (Sadan et al 2001:15) before another two courts were designated as SOCs. High caseloads affected the quality of services that were being delivered to complainants in terms of decreased time for consultation and court preparation (Sadan et al 2001:43). Similar issues were raised in an earlier study of the Wynberg SOC by Stanton et al (1997) who found that adult complainants were dissatisfied because they had to deal with different prosecutors, pre-trial meetings with prosecutors did not take place, or they only had brief consultations with prosecutors on the day of the trial.

High caseloads also resulted in high levels of stress for SOC staff, sick leave and resignations. One senior prosecutor suggested that there should be support services for staff and opportunities for de-briefing given the subject matter of the cases (Sadan et al 2001:18). High turnover of prosecutors was found to lead to loss of expertise, and lack of staff meant that there was insufficient time for adequate pre-trial briefings of complainants (Moult 2002:32). Sadan et al (2001:53) considered that the backlog of cases was of such a magnitude that it could undermine the quality of service delivery of the Wynberg SOC. This finding was supported by Moult (2002:31) who, in interviews with prosecutors, reported that prosecutors 'left the system rapidly as a result of caseload and poor pay', thus hampering the success of the SOC.

A high caseload also meant that prosecutors could not always be released for training sessions. In addition, each roleplayer (CPU, Department of Justice, Department of Health, Justice College) took responsibility for training their own staff so that training programs varied from being well-established to non-existent. Sadan et al (2001:47–49) considered that an integrated approach to training would improve the effectiveness of the SOC as well

as the content of training programs by utilising experts from each field. At the same time, a qualitative study by an honours student found that secondary victimisation of complainants was still an on-going issue in the Wynberg SOC due to the adversarial nature of the trial, with the court having little or no impact on styles of cross-examination and defence tactics (Moult 2002; see also Stanton et al 1997).

The Family Violence Court in Manitoba

In contrast to the limitations in the data from the Wynberg and Cape Town SOCs, the specialist Family Violence Court (FVC) in Manitoba, Canada, constitutes a more reliable case study because of the amount of empirical data that has been collected since the court was established in 1990 and the fact that the FVC prosecutes most cases of child sexual assault for which *separate* empirical data is available.

The Manitoba FVC was the first specialist court of its kind in North America and began operation in September 1990 to deal with 'the special needs of victims who are in "a relationship of trust, dependency and/or kinship" with their alleged offender', including children (Ursel & Gorkoff 2001:81).

The court, which is a provincial court, deals with first appearances, remands, guilty pleas and trials for spousal abuse, child abuse (including CSA[9]) and elder abuse cases (Ursel 1992:100). The goals of the specialist court were to (i) 'avoid lengthy court delays and set court dates as quickly as possible'; (ii) 'create a sensitive and supportive environment for victim/witnesses' and (iii) 'provide more consistent and more appropriate sentencing' (Ursel 1997:265). In addition, it was believed that the specialisation of judges and Crown attorneys would give rise to an 'understanding of the unique issues and dynamics involved in each of these three offenses', thus encouraging victims to participate in the system (Ursel 1992:100).

When the FVC was established, specialisation was particularly focused at the 'front end' by creating specialist Crown prosecutors and specialised victim services. In relation to child abuse cases, Ursel and Gorkoff (2001:81) describe the key components of this specialised system as comprising:

(i) a child abuse investigation unit within the Winnipeg Police Service;

(ii) two victim support programs: the Women's Advocacy Program and the Child Abuse Victim Witness Program within the Department of Justice;

(iii) a specialised unit in the prosecutor's office with specialist Crown attorneys who exclusively prosecute family violence matters from bail hearings to trial;

(iv) specially designated courtrooms and dockets for intake, screening court and trials;

(v) a child friendly courtroom that is used for child abuse prosecutions;

(vi) initially fourteen designated judges.

Ursel (2002:55) notes that one of the consequences of specialisation was to redefine the 'work culture' of the FVC prosecution unit:

9 Because it is considered that all children are in a relationship of trust and/or dependency with all adults, cases of child abuse, including sexual abuse, are prosecuted in the Family Violence Court.

> [p]rior to specialization, neither the structure nor values of the crown attorney's office were responsive to the needs of [in particular] domestic violence victims. ... The creation of the specialized family violence unit in prosecutions was a necessary but not sufficient impetus to change the prosecutorial culture. The critical complement to the structural changes was the introduction of policy guidelines to assist crown attorneys in the prosecution of [family] violence cases. These guidelines reflect the dual consideration of rigorous prosecution and sensitivity to the victim.

In addition, staff from the specialist unit[10] believe that prosecutors have a particular advantage over defence counsel (who do not necessarily specialise in domestic violence or child sexual assault cases) because specialisation increases the expertise of Crown prosecutors which has a flow-on effect on the quality of the Crown's case. It was also noted by prosecutors that specialisation allows them to establish an appropriate rapport with children who are especially vulnerable and a specialist unit builds up an environment of expertise and support that guards against burnout. Ursel and Gorkoff (2001) have similarly observed that the creation of a culture of specialist knowledge has flow-on effects in terms of a specialist group of peer prosecutors and greater awareness of the needs of vulnerable witnesses. Initially, this specialisation also included specialist judges who sat on the FVC exclusively. Although this is no longer a feature of the FVC (due to the volume of cases passing through the court, all provincial court judges now rotate through the FVC), the designation of trained judges to sit on a specialist court means that the concept of specialisation reaches up to the judicial level, creating a group of judges who are in a position to make consistent decisions in relation to questions of law, the protection of vulnerable witnesses and prevention of abusive cross-examination practices.

Not only have changes been observed in relation to process, but Ursel's and Gorkoff's (2001) data shows that *outcomes* change significantly with court specialisation, from bail decisions right through to conviction rates and sentencing. Some of the effects of specialisation in relation to CSA cases in the Winnipeg FVC include the following:

(i) court staff keep track of upcoming cases and make sure there are enough courtrooms for child sexual assault trials, to improve disposition times;

(ii) the same prosecutor stays with the case until it is finalised;

(iii) significantly higher conviction rates compared with the National Data for Canada[11] (Ursel & Gorkoff 2001:88). Higher conviction rates have been found in relation to all categories of family violence prosecuted in the FVC (Ursel 2002);

(iv) a higher percentage of convicted offenders received a jail sentence (63%) compared to 54% of offenders nationwide;

(v) guilty verdicts dramatically increased the likelihood of a jail sentence (80%) compared to guilty pleas (63%);

(vi) a dramatic increase in the length of sentence with the FVC sentencing 37% of convicted offenders to two years or more, compared with the National Data which showed that only 6% of convicted offenders of CSA were sentenced to two years or more;

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10 Personal communication to the author by Crown prosecutors, Tim Owens and Lynne Stannard in June 1999.

11 In the Winnipeg FVC between 1992–1997, there were 604 child sexual abuse cases. 416 proceeded to court. Of those, 58% (242) resulted in a guilty plea and 42% (174) proceeded to trial. Trial outcomes were: 3% discharged; 13% dismissed; 37% not guilty, 49% guilty (Ursel and Gorkoff, 2001: 87). Overall, the conviction rate was 54% (guilty pleas and guilty verdicts combined) compared with 46% for the National Data. This conviction rate has remained relatively constant since 1997 (Ursel, 2004).

(vii) comparisons with data on physical child abuse cases showed that the FVC treated *sexual abuse* more seriously in terms of stay rates (lower for sexual abuse cases), cases going to trial, guilty verdicts, incarceration and length of sentence;

(viii) the criminal justice system is able to focus on outcomes, as well the process that children, as vulnerable witnesses, must go through.

Many of these outcomes are also apparent from the latest data provided by Ursel (2004), although this data covers all child abuse (physical and sexual abuse) for the period September 1992 to September 2000. The overall conviction rate (guilty pleas plus guilty verdicts) was 56%, which was higher than the conviction rate for crimes against persons in other courts in Manitoba. From a comparison of the physical and sexual abuse cases, Ursel (2004) concluded that sexual abuse was treated as a more serious offence by the FVC according to the following indicators:

(i) a higher percentage (22%) of sexual abuse cases went to trial compared to 10% of physical abuse cases;

(ii) 50% of sexual abuse cases were found guilty at trial compared to 41% of physical abuse cases;

(iii) 53% of individuals charged with physical abuse entered a guilty plea compared to 44% in sexual abuse cases;

(iv) 58% of convicted sex offenders receive a sentence of incarceration compared to 36% of offenders convicted of physical abuse; and

(v) a guilty verdict for sexual abuse dramatically increased the likelihood of a gaol sentence for the offender (75%) compared to a guilty plea (54%) compared to the same data for offenders convicted of physical abuse.

It is notable that these outcomes have been achieved without the type of vulnerable witness protections in use throughout Australia.

By way of comparison, the conviction rates *at trial* in the Manitoba FVC for the period September 1992 to September 1997 (49%) and for the period September 1992 to September 2000 (50%) are significantly higher than the conviction rates *at trial* found in NSW for the period April 1991 to April 1992 (38%) (Cashmore 1995) and for the period January 1992 to December 1996 (34%) (Cossins 2001) in the NSW higher courts. In subsequent years (1998–2001) the conviction rate at trial in NSW has continued to decline, according to data supplied to the author by the NSW Bureau of Crime Statistics and Research (20.7% (1998); 24.9% (1999); 21.1% (2000)). Thus, it appears that a specialist court not only affects process and procedure but is an effective means for increasing conviction rates and changing sentencing patterns to include more custodial sentences and longer custodial sentences. This latter outcome is significant since it would then be possible to link treatment programs with sentencing in a more effective way.

Although vulnerable witness protections make a discernible difference to complainants' experiences in court (as discussed previously), the above analysis of the FVC shows that *specialisation without vulnerable witness protections* produces significantly different outcomes in terms of conviction rates and sentencing. The obvious solution would be to recommend the establishment of a specialist court that combines the key features of overseas specialist courts and vulnerable witness protections, in order to meet the twin objectives of decreasing the incidence of CSA in the community and minimising the secondary victimisation of child complainants. A specialist court based on the adversarial model to meet these objectives would ideally include the following features:

- creation of a core group of specialist judges who have sufficient experience in conducting criminal matters (particularly sexual assault trials) and are trained in child development issues, the special problems confronted by Aboriginal complainants and complainants with cognitive disabilities;
- rotation of specialist judges through the sex offences court to minimise burnout;
- establishment of a specialist prosecutorial unit with prosecutors undergoing the same training as judges;
- appointment of one prosecutor for the duration of the case so that continuity is maintained from committal proceedings through to sentencing;
- specialist listing arrangements and a screening process to identify cases that fall within the sex offences category;
- case management to reduce delays and arrange pre-trial matters;
- exemption of children from giving evidence at committal hearings, to reduce the number of times a child gives evidence (as is already the case in NSW, Tasmania and WA).
- designated courtrooms equipped with state-of-the-art CCTV facilities;
- establishment of a remote room which is located outside the court precinct with a waiting room and play area for complainants and support persons (as is already the case in NSW and WA);
- legislation which permits the pre-recording of a child's evidence-in-chief, cross-examination and re-examination (see, for example, s 106I *Evidence Act 1906* (WA));
- otherwise, mandatory use of CCTV where pre-recording for children is not possible or chosen;
- use of intermediaries to translate defence counsel questions into age/culturally appropriate language for all child complainants;
- the establishment of an on-going training program for prosecutors and judges including support services to enable opportunities for debriefing to prevent burn-out and high staff turnover (Sadan et al 2001).
- child witness service to prepare the child and provide pre- and post-trial counselling (Dible & Teske 1993; Sadan et al 2001; Bellett 1998, 2000).
- alternative models for the punishment of offenders, such as diversion of offender into treatment, where appropriate, plus the attachment of mandatory treatment programs to custodial sentences, including an assessment of the prospects of rehabilitation of the offender.
- continued monitoring of the offender after release from prison using the NSW child protection register, NSW child protection prohibition orders and extended supervision orders[12] as models;
- the establishment of a data collection method to allow for an evaluation of the court's effectiveness and the assignment of a specific agency to manage, monitor and evaluate the court.

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12 Section 6, *Crimes (Serious Sex Offenders) Act 2006* (NSW).

Despite the above conclusion, it is still salient to ask why 44% of offenders are found not guilty at trial in the Manitoba FVC and to propose that further change, particularly in the form of evidentiary and procedural changes, may be required to further increase conviction rates. There is no evidence that makes it possible to speculate about what an 'ideal' conviction rate would be. However, Australian and overseas data show that there is a high attrition rate of sexual assault cases at both the pre-trial and trial stages (Lievore 2003; Wundersitz 2003; Fitzgerald 2006), suggesting that the cases that do go to trial are those that have been selectively filtered by prosecutors for attributes that enhance the likelihood of a conviction. It is, therefore, reasonable to assume that a similar or even more rigorous selective filtering process occurs in Manitoba, given that vulnerable witness protections do not exist to encourage complainants who might not be willing or capable of giving evidence in open court. If cases are subject to such filtering processes, the obvious question is why the conviction rate at trial is not higher than 56%.

In addressing this question it is necessary to recognise that specialist courts are an *administrative* response to sexual offences and do not necessarily address the *procedural* and *evidentiary* problems faced by complainants and prosecutors within the adversarial justice system (Moult 2002; quoting Stanton et al 1997).

All three evaluations of the Wynberg SOC indicate that court specialisation needs to be accompanied by controls over cross-examination and defence tactics (Sadan et al 2001) since it is the most unregulated aspect of adversarial proceedings. Indeed, much has been written in recent years about the negative effects of cross-examination on the trial process, particularly in sexual assault trials (Cashmore & Bussey 1995; Parliament of Victoria, Crime Prevention Committee 1995; Department for Women 1996; ALRC & HREOC 1997; Royal Commission into the NSW Police Service 1997; Queensland Law Reform Commission 2000; Eastwood & Patton 2002; Scottish Executive Central Research Unit 2002; NSW Parliament, Legislative Council, Standing Committee on Law and Justice 2002). These controls could involve greater regulation over cross-examination by the trial judge through the introduction of legislative changes (see, for example, s275A *Criminal Procedure Act 1986* (NSW)), and the use of court-appointed and trained intermediaries to conduct cross-examination (in age appropriate language) on behalf of the defence[13] in order to eliminate contact between defence counsel and the complainant and, hence, opportunities for intimidation and harassment.

Furthermore, to enhance the primary objective of increasing prosecution and conviction rates, serious thought would also need to be given to relaxing particular exclusionary rules of evidence which prevent relevant evidence being considered by the trier of fact. These rules include the hearsay, coincidence and tendency rules, as discussed in the first paper. Particular problems were also identified in that paper in relation to the warnings that are more or less mandatory in sexual assault trials, such as the *Murray* direction when there is only one witness testifying to a crime and the *Longman* and *Crofts* warnings where there has been delay in complaint.[14] However, the problem of the possible effect of warnings on a jury (Cashmore 1995) and the admissibility of evidence that is considered to be prejudicial

13 Based on s29 of the *Youth Justice and Criminal Evidence Act 1999* (UK). Intermediaries or communication aids for witnesses with communication difficulties are now available in NSW as a result of the *Criminal Procedure Amendments (Sexual and Other Offences) Act 2006*.

14 As a result of recommendations by the Criminal Justice and Sexual Offences Taskforce, the NSW Government introduced the *Criminal Procedure Amendments (Sexual and Other Offences) Act 2006* which included amendments designed to ameliorate the *Longman* and *Crofts* warnings. Nonetheless, the warnings have not be abolished.

to the accused (because of how a jury will weigh such evidence) might be addressed by considering a 'less adversarial' or inquisitorial model for prosecuting child sex offences and the use of judge only trials.

A 'less adversarial' model

One further aspect of specialisation to consider is a specialist court based on the inquisitorial system, especially where evidentiary problems are substantial — such as the sexual abuse of children in Aboriginal communities. Evidentiary problems arise because Aboriginal children face particular difficulties in an adversarial system due to a range of factors:

- English may not be their first language or their English skills may be underdeveloped;
- their attendance at school may be poor;
- they may be affected by the child abuse and neglect within their family systems; or
- they may be affected by drugs, alcohol or petrol sniffing.

These factors mean Aboriginal children are particularly vulnerable as witnesses in child sexual assault trials because the adversarial system places so much reliance on oral evidence and the reliability of oral evidence.

Where there are substantial evidentiary problems, it may be that 'a paradigm shift' is needed in relation to the prosecution of child sexual assault as suggested by Jerrard JA in *R v D* [2002] QCA 445 at [46]:

> [I]n cases of this nature, the focus of the inquiry ought to be upon what has happened in the child's life rather than upon proof of a criminal charge, although the enquiry into what has happened may well establish that a criminal offence has been committed; and the procedures routinely used in the criminal jurisdiction should be radically reconsidered. This would require a paradigm shift.

Such a shift would involve an inquiry into what happened in the child's life and an investigation of the truth of the allegations of sexual abuse, rather than the focus of the trial being on proof of a criminal charge and an inquiry into the credibility of the child's evidence. Whilst there has been some debate about the appropriateness of adopting inquisitorial practices and procedures into an adversarial system (Dublin Rape Crisis Centre and the School of Law, Trinity College Dublin 1998; Ellison 2001), a model that could be of use in considering these questions is a pilot program presently being conducted in the Family Court of Australia for child custody cases.

A study of inquisitorial methods in Europe by Justice O'Ryan saw the Family Court introduce a pilot program based on a 'less adversarial' (or more inquisitorial) model for the resolution of custody cases (Pelly 2004:5; O'Ryan 2004). The program is called the Children's Cases Program and the proceedings are considered to be 'less adversarial' because they are controlled by the judge rather than the parties. The term 'less adversarial' can refer to any changes toadversarial processes that seek to transfer the decision-making capacity of the parties to control the proceedings to the presiding judge or other court-appointed personnel.

When considering the type of paradigm shift that Jerrard JA advocated in *R v D*, the question is whether a similar 'less adversarial' approach would be appropriate in a criminal

context and whether there is a constitutional basis for such an approach in terms of the exercise of judicial power.

One of the key features of the Family Court pilot is the consent of the parties to a number of things such as waiver of the rules of evidence under s190 of the *Evidence Act 1995* (Cth), consent to the judge making findings on issues without there being a concluded outcome, and participation in the evaluation of the program. The judge takes charge in a more significant way compared to traditional adversarial proceedings:

- the judge identifies the contentious facts/issues that are to be determined between the parties;
- all evidence is 'conditionally admitted', the judge determines the weight to be given to the evidence and the manner in which it is presented. Objections to the admission of evidence can only be made on the grounds of privilege or on the grounds that it has been procured illegally or fraudulently;
- in consultation with the parties, the judge will determine the witnesses to be called and the issues they will be called to evidence about although evidence-in-chief will usually be by way of affidavit.[15]

Although the parties' lawyers are present in the hearing and can assist in deciding the issues in dispute, their role is reduced because they do not control the proceedings.

Whether a 'less adversarial' approach would be appropriate in the criminal trial context, requires consideration of the scope and nature of judicial power exercised in State courts. When State courts are exercising State jurisdiction (as opposed to Federal jurisdiction), they are not required to exercise power according to Chapter III of the Commonwealth Constitution. This means that they may exercise non-judicial powers since the separation of powers doctrine does not operate in a constitutional sense in NSW and probably also the other states (*Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577; *Baker v R* [2004] HCA 45; see also *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 on the powers of the Queensland Supreme Court). A state court based on a 'less adversarial' model may exercise powers that would not normally be considered to be judicial in nature, as long as it was not exercising Federal jurisdiction.

Even so, it appears that a 'less adversarial' approach and the degree of discretionary judicial power that it would involve is well within the definition of judicial power as defined in a number of High Court cases (*Huddart Parker & Co Pty Ltd v Moorehead* (1909) CLR 330; *R v Davison* (1954) 90 CLR 353; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617; Sue *v Hill* (1999) 199 CLR 462). For example, in NSW, one of the key changes to the criminal trial in a 'less adversarial' approach would involve an amendment to s190 of the *Evidence Act 1995* (NSW) to allow a waiver of the rules of evidence without the consent of the accused. This would be particularly necessary in relation to hearsay evidence and tendency and coincidence evidence, including any other allegations or prior charges of a sexual nature against the accused and any prior convictions for sexual assault.

Another key feature of a 'less adversarial' model would be judge-alone trials with the judge as fact-finder. If s190 of the *Evidence Act* were amended to allow dispensation of the rules of evidence in child sexual assault trials without the consent of the accused,[16] this dispensation would still mean the judicial powers exercised in relation to the admission of

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15 'Practice Direction for Children's Cases Programme', Family Court of Australia.

16 At present, s190 allows for the dispensation of the rules of evidence as set out in sub-section (1) with the parties' consent.

evidence and the weight to be given to that evidence were valid judicial powers. It is considered that the dispensation of the laws of evidence in Federal Courts (which, as Chapter III Courts, may only exercise power that comes within the definition of judicial power) still amounts to a valid exercise of judicial power, since this dispensation does 'not exonerate the Court from the application of substantive rules of law and is consistent with, and indeed, requires the application of, rules of procedural fairness' (*Sue v Hill* (1999) 199 CLR 462 at 485, per Gleeson, Gummow and Hayne JJ).

Even with dispensation under s190, only relevant evidence could be admitted (under Part 3.1 of the *Evidence Act*) and the trial judge would still be required to make binding decisions about the admissibility of evidence and, as fact-finder, to consider the reliability of particular evidence when determining the weight to be given to it.[17] Indeed, the accused's right to appeal would be unaffected and could include grounds such as the admission of irrelevant evidence and the attribution of too much weight to a particular item of evidence by the trial judge.

Many people will argue, however, that a 'less adversarial approach' would infringe the accused's right to a fair trial. But before being able to analyse the validity of this claim, consideration would need to be given to what this right actually entails. A number of rules of law and practices that regulate trial proceedings are said to embody the right to a fair trial. Although courts do not tend to 'list exhaustively [all] the attributes of a fair trial' (*Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J; see also Toohey J at 353), an analysis of the case law finds that they include:

- adequate time and facilities for the preparation of his/her defence (*Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J);
- freedom from 'excessive questioning or inappropriate comment' by the trial judge where that questioning indicates that the accused has been denied a fair trial (*Galea v Galea* (1990) 10 NSWLR 263 at 281, per Kirby A-CJ);
- if required, the provision of free assistance of an interpreter for the accused and his/her witnesses (*Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J; at 331, per Deane J);
- competent legal representation (*Dietrich v R* (1992) 177 CLR 292 at 317, per Brennan J; at 349, per Dawson J);
- where a lack of legal representation (which is not the fault of the accused) may lead to an unfair trial, a trial judge has the power to grant a stay of proceedings until representation is available (*Dietrich v R* (1992) 177 CLR 292 at 298, per Mason CJ and McHugh J; at 371, per Gaudron J). Such a situation is more likely when an accused has been charged with a serious offence;
- that the trial is to be conducted in accordance with law (*Dietrich v R* (1992) 177 CLR 292 at 326, per Deane J; at 362, per Gaudron J);
- the right to procedural fairness which includes prevention by the court of abuse of process[18] through a stay of proceedings (*Barton v R* (1980) 147 CLR 75 at 96 per Gibbs ACJ and Mason J; *Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J; at 327, per Deane J);

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17 Parts 3.10 (rules governing privileges) and 3.11 (discretions to exclude evidence) would still apply according to s190, *Evidence Act 1995* (NSW).

18 For a definition of abuse of process, see *Jago v District Court of NSW* (1989) 168 CLR 23 at 47 per Brennan J.

- exclusion of admissible and relevant evidence where its probative value is outweighed by its prejudicial effect (*Dietrich v R* (1992) 177 CLR 292 at 363, per Gaudron J);
- specific judicial warnings to be given in relation to unreliable evidence such as accomplice evidence (*Dietrich v R* (1992) 177 CLR 292 at 328, per Deane J) or prison informant evidence (*Pollitt v R* (1992) 174 CLR 558);
- an assessment of where and when a trial should be held ((*Dietrich v R* (1992) 177 CLR 292 at 363, per Gaudron J) because of, for example, pre-trial publicity.

This above elaboration of the attributes of the fair trial principle shows that it is hard to see how, exactly, the rights of the accused would be infringed by moving to 'less adversarial' proceedings because the right to a fair trial does not guarantee a particular style of proceedings nor a set of positive entitlements. In any criminal trial, the prosecution's burden of proof and the presumption of innocence ensure that fundamental trial processes must be followed — the fact-finder determines the weight to be given to particular evidence and makes its findings in a context that is weighted in favour of fairness to the accused. This context would be preserved in 'less adversarial' proceedings.

A useful test for determining whether a trial has been or will be unfair is whether it 'involves the risk of the accused being improperly convicted' (*Dietrich v R* (1992) 177 CLR 292 at 365, per Gaudron J). Clearly, the aspect of the fair trial principle that could be affected by a 'less adversarial' approach is the admissibility of prejudicial or unreliable evidence. In order for a 'less adversarial' approach not to impinge upon the fair trial principle in relation to the admission of prejudicial evidence, it would be necessary for child sexual assault trials to be judge alone trials to overcome the possible prejudicial effect on a jury from admitting tendency/propensity evidence about, for example, the accused's past sexual conduct with children. If the prejudice that is sought to be avoided is misuse of the evidence because of an emotional response from jury members, then the rationale for excluding such evidence is greatly undermined if the fact-finder is the trial judge rather than a jury (Aronson & Hunter 1998:992–993). The fact that some criminal trials involve non-jury trials at the election of the accused indicates that the absence of a jury does not, of itself, infringe the fair trial principle, nor is the accused deprived of his/her rights to meet the case against them (*Nicholas* (1998) 193 CLR 173 at 208–209, per Gaudron J).

One aspect of the fair trial principle that is rarely discussed, however, is 'the interests of the Crown acting on behalf of the community' (*Dietrich v R* (1992) 177 CLR 292 at 335, per Deane J; quoting *Barton* v *R* (1980) 147 CLR 75 at 101, per Gibbs ACJ and Mason J) and the fact that the concept of fairness is not fixed and immutable and 'may vary with changing social standards and circumstances' (*Dietrich v R* (1992) 177 CLR 292 at 328, per Deane J; at 364, per Gaudron J). The concept of fairness can even take into account the interests of the victim (*Dietrich v R* (1992) 177 CLR 292 at 357, per Toohey J), which, in the context of child sexual assault, would include the 'need to promote the accuracy and coherency of a complainant's evidence' and the desire of encouraging victims to report sexual offences to the police (Debus 2003:2957).[19] Changing community standards mean that the community has an interest in the criminal justice system recognizing the frequency of CSA, the difficulties of protecting vulnerable children from the sophisticated grooming

19 This is amply demonstrated by the recent enactment of s 294A, *Criminal Procedure Act 1986* (NSW) which prevents an unrepresented accused who is charged with a sexual assault offence from personally cross-examining the complainant.

methods of offenders and the high probative value of evidence that shows a defendan's previous involvement in sexual activities with the complainant or other children.

In summary, there appears to be no barrier to the establishment of a specialist court based on a 'less adversarial' model on constitutional grounds, since State courts may exercise non-judicial powers as long as they are not exercising Federal jurisdiction. In any case, the broader judicial powers that would be exercised within a 'less adversarial' model are within the definition of judicial powers set out by the High Court in a number of cases. This means it may be possible to establish a 'less adversarial' model for the prosecution of child sex offences by careful reference to the broader judicial powers that might be exercised and all aspects of the fair trial principle to ensure that the principle is not undermined.

The above discussion shows that the fair trial principle may not necessarily be undermined by conferring discretionary judicial powers that would enable a trial judge to exercise greater control over the trial process such as: determining the issues in dispute and the witnesses to be called; admitting, and determining the weight to be given to all relevant evidence; admitting prejudicial but highly relevant evidence; testing witnesses' evidence and controlling the cross-examination process, particularly if this control focused on the *style* rather than the content of cross-examination.[20] Indeed, cross-examination of the complainant could take place under the court's guidance through an intermediary appointed by the court or through a legal representative appointed for the complainant (Cossins 2004).

Conclusion

The two papers in this series (Cossins 2006a, 2006b) have considered a number of key reform options in order to address the uniqueness of child sexual assault as a crime and the difficulties associated with prosecuting child sex offences. The simplest and cheapest approach, from the point of view of government funding, would be to move to a model based on the NSW Pilot Program,[21] particularly since all States and Territories have some type of vulnerable witness legislation in place, which would see the establishment of remote rooms attached to all major court registries and state-of-the-art CCTV facilities in selected courts.

However, such reforms are deceptive since they mask the fact that vulnerable witness protections do not appear to affect trial processes and outcomes, including conviction rates, nor are they capable of achieving the other important public policy objectives discussed in this article. The challenge in devising an alternative model for prosecuting child sex offences involves a range of considerations including how the prosecution process and outcomes will affect:

- the safety of the victim and other children;
- reduction of the incidence of CSA;
- increasing disposition times for child sexual assault cases:

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20 This is now a requirement, in any case, under s 275A, *Criminal Procedure Act 1986* (NSW). In addition, the NSW CCA has said that controls over the content of cross-examination in the form of rape shield provisions cannot be successfully challenged (*MAK and MSK*, 6 September 2004, Mason P, Wood CJ at CL, Barr J)

21 The pilot program represents a specialist child sexual assault jurisdiction in the District and Local Court in Sydney's western suburbs. It commenced operation on 24 March 2003 in Parramatta; by October 2003 it had been extended to courts in Penrith and Campbelltown and, by February 2004, to District and Local Courts in Dubbo.

- increasing the conviction rate for child sex offences;
- the imposition of custodial sentences;
- the length of custodial sentences;
- the rehabilitation of offenders through treatment programs; and
- linking custodial sentences with treatment.

The data compiled by Ursel and Gorkoff (2001) and Ursel (2004) shows that many of the above objectives would be achievable through the establishment of a specialist court. Arguably, the most appropriate reform measure would be the establishment of a specialist sex offences court using the Manitoba FVC as a model, based either on the adversarial system or a 'less adversarial' approach and utilising all the vulnerable witness protections represented by the NSW Pilot Program. It is likely, however, that a 'less adversarial' approach would address many of the problems associated with adversarial systems, in particular:

- the number and complexity of judicial warnings to juries;
- the inadmissibility of relevant evidence considered too prejudicial to go before a jury;
- the rigours of the cross-examination process and its effect on vulnerable witnesses (particularly Aboriginal complainants);
- the unreliability of cross-examination of children as a method for determining the occurrence of child sexual abuse; and
- the inability to undertake a much wider inquiry, as the Family Court does, to establish whether a child has been sexually abused.

At the same time it is necessary to recognize the disadvantages associated with the establishment of a specialist court in Australia and whether they can be overcome. First, the geographic size of states like Queensland, NSW and WA means there would be a loss of expertise of trained judges once they went on circuit, unless those judges were only required to sit on the specialist court. The establishment of a specialist court could involve the appointment of new judges who would only sit on that court and who would undergo a training program at the time of appointment. In particular, it appears from the recent NSW experience in equipping four District Courts for the prosecution of child sex offences, that without specialisation, it is impossible to require judges to undertake training in child development and CSA issues. Alternatively, a voluntary core group of judges could be created who are specially trained and rotate through the specialist court in a way that is similar to the rotation of magistrates in the Wynberg Sexual Offences Courts. From my own discussions with judges about this possibility, it would be wise to establish on-going debriefing programs for judges in order to deal with the issue of burn-out and emotional transference, using as a model programs that exist for sexual assault counsellors who face very similar problems.

Secondly, a specialist child sex offences court would need a sufficient caseload to justify its establishment costs. One option would be to establish a specialist child sex offences court in the capital city of each state and territory that would hear all CSA cases. That, however, would create travel and accommodation problems for children from rural areas, as well as family disruption, financial hardship and disruption to the child's life. As suggested by the NSW Attorney-General's Department in discussions with the author, one answer would be a mobile specialist court (a specially equipped vehicle with CCTV

facilities) that went on circuit, or the establishment of specially equipped courtrooms and remote rooms in major rural/regional centres. Another alternative, frequently used in WA, is to pre-record the evidence of complainants who live in rural areas. Finally, in order to ensure a sufficiently high case-load it might be necessary to create a specialist court that deals with the prosecution of sex offences against *both* children and adults, given the number of similarities associated with the prosecution of both types of crimes. In fact, this was one of the issues considered in NSW by the Criminal Justice Sexual Offences Taskforce which was established in December 2004 to examine the feasibility of a specialist sex offences court for NSW.

The two papers in this series have shown that without more radical reform, reporting, charging and conviction rates for child sexual assault are likely to remain relatively low and the majority of child sex offenders will remain outside of the criminal justice system. Ultimately, the crime of CSA will remain one that is beyond the ability of Australian governments to adequately address and solve.

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